

**WO**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Holly Martenson,	)	No. CV-09-01314-PHX-NVW
	)	
Plaintiff,	)	<b>ORDER</b>
	)	
vs.	)	
	)	
RG Financing, et al.,	)	
	)	
Defendants.	)	

Before the Court is Plaintiff's Motion for Leave to File Fourth Amended and Supplemental Complaint. (Doc. 110.) "The court should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), but need not do so if amendment would be futile, *Foman v. Davis*, 371 U.S. 178, 182 (1962). Here, amendment would be futile because each cause of action is defective. Accordingly, the Court will deny the motion and dismiss this case.

Defendants have now foreclosed on Plaintiff's home twice. As the first foreclosure was pending, Plaintiff filed suit in this Court alleging "wrongful foreclosure/breach of contract." Plaintiff did not succeed in stopping the foreclosure, but following the trustee's sale, Defendants recorded a notice of rescission. Thus, Defendants unwound the first foreclosure and returned the parties to their previous positions. Defendants then served Plaintiff with a new notice of default and proceeded with a new foreclosure. The trustee's sale in that foreclosure took place September 30, 2010. Defendants bought the home at the

1 trustee's sale, and later evicted Plaintiff from her home. Plaintiff now attempts to reframe  
2 her causes of action to attack the second foreclosure.

3 Plaintiff's first cause of action is for quiet title, based on the theory that Defendants'  
4 notice of default overstated the amount required to cure, thus supposedly invalidating the  
5 entire foreclosure sale process. The Court already resolved this issue, finding that  
6 Defendants' notice of default "provided a good faith estimate of the payment required to  
7 cure." (Doc. 97 at 5.) Having adjudicated a crucial factual element of Plaintiff's claim in  
8 favor of Defendants, it would therefore be futile to permit Plaintiff to assert this claim.  
9 Amendment would also be futile for the reasons stated in this Court's analysis of Plaintiff's  
10 fourth cause of action (for breach of the covenant of good faith and fair dealing), below.

11 Plaintiff's second cause of action is for "wrongful foreclosure/predatory lending."  
12 Plaintiff appears to assert two bases for this cause of action. First, she complains that  
13 Defendants wrongfully refused to accept money Plaintiff was willing to pay toward the loan,  
14 although Plaintiff admits that it was not enough money to cure the default. The Court sees  
15 no cause of action here absent a contractual provision obligating Defendants to accept less  
16 than the cure amount. Such a contractual provision would be highly unusual, and unless  
17 Plaintiff specifically pleads its existence, the Court finds Plaintiff's first "wrongful  
18 foreclosure/predatory lending" theory implausible.

19 Plaintiff's second "wrongful foreclosure/predatory lending" theory alleges that she  
20 was damaged because Defendants evicted her from the home. But, as explained throughout  
21 this order, Plaintiff has alleged no plausible argument that Defendants wrongfully foreclosed,  
22 and therefore no basis for declaring the eviction likewise wrongful. The Court therefore  
23 finds that it would be futile to allow Plaintiff to assert her second cause of action.

24 Plaintiff's third cause of action is for declaratory judgment under Arizona's  
25 declaratory judgment statute, A.R.S. §§ 12-1831 to -1846. Plaintiff asks this court to declare  
26 that Defendants wrongfully pursued foreclosure by inserting into the second notice of default  
27 a demand for sums due on the note, attorneys fees, and other costs. Plaintiff asserts that  
28 Defendants could not legally ask for these amounts because the *first* foreclosure wiped out

1 all her liability to Defendants under Arizona's anti-deficiency statute, A.R.S. § 33-814(G).  
2 From a substantive standpoint, this argument suffers serious defects, but the Court will  
3 reserve that analysis for its discussion of Plaintiff's fourth cause of action. From a  
4 procedural standpoint, the Court need only say that it may refuse declaratory judgment  
5 where, as here "such judgment or decree, if rendered or entered, would not terminate the  
6 uncertainty or controversy giving rise to the proceeding." A.R.S. § 12-1836. The Court  
7 cannot see how a judgment in Plaintiff's favor would terminate any uncertainty or  
8 controversy, in light of the argument's substantive defects.


9 As to those substantive defects, Plaintiff's fourth cause of action asserts breach of the  
10 covenant of good faith and fair dealing, relying on the same anti-deficiency argument she  
11 asserted in her third cause of action. Specifically, Plaintiff claims that: (1) Arizona's anti-  
12 deficiency statute wiped out all her liability to Defendants after the first foreclosure;  
13 (2) Defendants therefore could not use the second notice of default to demand a cure,  
14 attorneys fees, costs, etc.; and accordingly (3) the second foreclosure sale was invalid for  
15 want of proper notice. This argument is illogical. To claim that the anti-deficiency statute  
16 wiped out her liability at the first (rescinded) trustee's sale is to acquiesce to the validity of  
17 the first trustee's sale. If the first trustee's sale was valid, then the second notice of default  
18 was not wrongful, just unnecessary — Defendants should have gone straight to eviction  
19 proceedings. Plaintiff cannot claim the benefits of the anti-deficiency statute *and* keep the  
20 house.

21 Plaintiff asserts a second theory for breach of the covenant of good faith and fair  
22 dealing, based on the allegation that Defendants had agreed to a modified payment schedule  
23 and dealt with Plaintiff unfairly by not allowing her to continue making modified payments.  
24 But even assuming Defendants agreed to modify the loan, Plaintiff admits that she eventually  
25 defaulted on that arrangement also. The Court therefore sees no viable legal claim here, and  
26 allowing amendment would be futile.

27 IT IS THEREFORE ORDERED that Plaintiff's Motion for Leave to File Fourth  
28 Amended and Supplemental Complaint (Doc. 110) is DENIED.

1 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants  
2 against Plaintiff, and that Plaintiff take nothing. The Clerk shall terminate this case.

3 DATED this 1<sup>st</sup> day of February, 2011.

4  
5   
6 Neil V. Wake  
United States District Judge  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28